Employment Standards TRIBUNAL

Appeals

- by -

Celerity Capital Corp.
(“Celerity” or "employer")

- and by -

Ralph Zimmerman

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2000/826, 2001/027

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

For convenience in this decision I deal with the appeals of both Celerity Capital Corp.(the "company" or "Celerity") and Ralph Zimmerman ("Zimmerman") of a Determination dated November 24, 2000. The Delegate found that Ronald Zimmerman had performed repair services in the company's apartment building located in Houston, British Columbia. The company hired Mrs. Zimmerman as a resident manager by telephone. Mr. Zimmerman performed handyman services, assuming that he was an employee, until, his status became clear to him when the company delivered a pay cheque to Mr. Zimmerman's wife, and no pay cheque to him. The Delegate found that there was no contact between the company and Ronald Zimmerman up until the date of the delivery of the pay cheque to Mrs. Zimmerman. The Delegate found nevertheless because of the wording of an advertisement in the paper, the employer expected two persons to work, and therefore Mr. Zimmerman was an employee. In my view the Delegate erred in this matter, and there was not a sufficient evidentiary basis for holding that Mr. Zimmerman was an employee, the ad was ambiguous and called for a resident manager, and a couple, and handyman skills. No reasonable person would have concluded that Mr. Zimmerman became an employee, by virtue of a reading of the ad and a response of his spouse to the ad. In Mr. Zimmerman's appeal he claims that the Delegate erred in not including a phone bill and moving expenses. This issue is disposed of by my ruling that Mr. Zimmerman was not an employee. Further , Mr. Zimmerman has not identified any basis under the Act or in contract to support repayment of these expenses. With regard to the moving expenses, these were not item discussed as part of any wage bargain, and there was no evidence before me of any claim under s. 8 of the *Act* for a misrepresentation inducing damages. With regard to the phone bill, there was no evidence before me that this was part of the wage bargain or that it was a business expense that the employer required the employee to pay (s. 21(2) of the *Act*. Even if Mr. Zimmerman was an employee, I would dismiss these claims, as Mr. Zimmerman did not show any error on the part of the Delegate.

ISSUES TO BE DECIDED

Did the Delegate err in finding that the Ralph Zimmerman was an employee?

Did the Delegate err in finding that Mr. Zimmerman was not entitled to payment of moving costs and the cost of a phone bill?

FACTS

This decision consists of the appeals of Ralph Zimmerman ("Zimmerman") and Celebrity Capital Corp. (the "company"), arising from the same set of facts, and considered by me on the basis of

the written submissions of Mr. Zimmerman, the company and the Delegate of the Director of Employment Standards.

Ms. Donna Zimmerman, the wife of Ralph Zimmerman, responded to an ad for an apartment manager placed in the April 12, 1999 edition of the Alaska Highway News, in Fort St. John. The ad read as follows:

> Apartment manager for Houston, Couple, bondable, knowledge of building trades, good people skills, Salary $2,000 per month, fax resumes ...

She dealt with John Davies of Celerity Capital Corporation. At the time of the phone call Ms. Zimmerman was a manager with the Pioneer Inn and Mr. Zimmerman had lost his job with the Pioneer Inn. At this time Mr. & Mrs. Zimmerman were expected to be the managers of the North Gate Inn, within six months. Mr. Davies had no telephone contact with Ralph Zimmerman, Ms. Zimmerman's husband. Ms. Zimmerman moved to Houston to take up employment. Part of the reason for taking the job was so that she could be closer to her mother who was living in Telkwa. Her mother had suffered a stroke recently. Mrs. Zimmerman worked as a resident manager. Her husband also provided handyman services in and around the residential complex. After the first pay cheque arrived the Mr. & Mrs. Zimmerman noted that there was no pay cheque for Mr. Zimmerman. Mr. Zimmerman phone Mr. Davies and asked him about it, and he said that he would see what he could do. Mr. Zimmerman apparently "blew up" on the phone and Mr. Davies response was now that I got you there what are you going to do. Mr. Zimmerman ceased performing handyman duties after the phone call. On June 21, Davies phoned and fired Ms. Zimmerman because the maintenance work was not being performed.

Mr. Zimmerman did maintenance work, painting, crack filling, repairing bathrooms, cleaning grounds and other jobs. Mr. Zimmerman claimed that he worked from May 12, 1999 to June 7, 1999 between 10 and 12 hours per day doing a variety of maintenance tasks.

In the Determination dated November 24, 2000 the Delegate found that Mr. Zimmerman was an employee of the employer, and found that Mr. Zimmerman was entitled to minimum wage in the amount of $7.15 per hour for 5 to 6 hours per day, and found Mr. Zimmerman entitled to the sum of $1,197.20.

Employer's Argument:

The employer argues that there was no contract of employment between him and Mr. Zimmerman. The Delegate interviewed Judy Cameron and Ron Cameron, previously employed as apartment managers for the employer in Houston. These persons were still resident at the time that Mr. & Mrs. Zimmerman moved to the complex. Mrs. Cameron confirmed that Mr. Zimmerman performed work at the complex. Ms. Cameron confirmed that the managers were responsible for everything form redoing bathrooms to installing hot water tanks.

The amount of the wage calculation has not been placed in issue by the employer. The employer claimed that there was no contract of employment between Celerity and Mr. Zimmerman, and that the advertisement was an "offer to treat". Celerity does not wish to pay Mr. Zimmerman, because the employer never asked Mr. Zimmerman to work for him.

Zimmerman's Argument:

Mr. Zimmerman takes the view that the Delegate determined correctly that he was an employee. Mr. Zimmerman's appeal is filed on the basis that the Delegate erred in the amount of the Determination. Mr. Zimmerman claims for the cost of a BC Tel phone bill ($150.88)and a cost of the move from Fort St. John to Houston ($1,600).

Delegate's Argument:

The Delegate argued that the company filed its appeal late, and time should not be extended. The Registrar has apparently dealt with this matter by calling for submissions on the merits. I note that while the employer did not file an appeal form within the time limit, the employer did file a letter which was in the nature of an appeal. If there is a problem here with the time, I have no hesitation in extending the time limits, because there is a very strong case on the merits, no apparent prejudice to the employee from any late filing, and a reasonable excuse for the late filing.

ANALYSIS

Issue 1: Was Ralph Zimmerman an employee?

The issue of whether Ralph Zimmerman was an employee of the company is an issue raised by the company. In an appeal under the *Act*, the burden rests with the appellant, in this case, the company to establish an error such that I should cancel or vary the Determination. The Delegate referred to the definition of employee, and found that on the evidence of the newspaper ad, he found that there was expectation on the part of the employer that Ron Zimmerman would perform work and therefore Ron Zimmerman was an employee. In my view, an "expectation for payment of work" does not by itself create a contract of employment.

In this case, my starting point is whether there is a contract of employment between Zimmerman and Celerity. I see no evidence from which I can confer a contract of employment. There is no evidence of any communication between Celerity and Zimmerman that can be characterized as an offer. The advertisement, is an invitation to submit a resume. There is no evidence here that Mr. Zimmerman submitted a resume and certainly no evidence of communication. I have also considered s. 1 of the Act and the definitions of employer and employee to determine if I can infer an employment relationship in the circumstances of this case.

When one considers the definition of employee, and employer in the *Act*, there is little assistance to Mr. Zimmerman.

The *Act* defines an employee as including:

(a) a person , including a deceased person, receiving or entitled to wages for work performed by another;

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee;

(c) a person being trained by an employer for an employer's business;

…

The *Act* defines an employer as including a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible , directly or indirectly, for the employment of an employee

In certain circumstances, the Tribunal may infer that there is an employment relationship between the parties. For example, where the employer has directly or indirectly permitted work to be performed, the Tribunal has had no hesitation in inferring an employment relationship between the parties: *Salmon Arm Rentals Ltd. BCEST # D214/96 (Kempf), Dosanjh, BC EST # D487/97 (Suhr)*. Section 1 captures employees who are being trained for work.

An offer of employment may be accepted by conduct. There, however, has to be some minimum degree of communication between the parties, before one could say that there was an offer capable of acceptance. An advertisement in the form placed in the newspaper in this case is not an offer, it is an "offer to treat" or a request to apply. There is no evidence that Mr. Zimmerman faxed a resume to the employer and applied for a position.

The company received a benefit from the work performed by Mr. Zimmerman, however, volunteers also bestow benefits. Mr. Zimmerman also received a benefit in living in the manager's suite. There appears to be no event to which Mr. Zimmerman can point from which a reasonable and objective person could conclude that a contract was formed between Mr. Zimmerman and Celerity. There is no event to which Mr. Zimmerman can point where the employer allowed him to work directly or indirectly. The evidence in this case points to the company being unaware that Mr. Zimmerman was providing service, until Mr. Zimmerman phoned the company following the issuance of a pay cheque to Mrs. Zimmerman.

There is no evidence on the fact of the Determination from which I can conclude that Ms. Zimmerman represented to the Delegate that the employer was agreeing to employ and pay two persons. There is no evidence that the principle of Celerity stood by and watched or had any knowledge that Zimmerman performed work. There is no evidence that Celerity allowed directly or indirectly Mr. Zimmerman to perform work. In my view while the employer did place an ad, the ad was at very least ambiguous, it referred to " a manager", and a couple. The

ad clearly called for handyman skills. Beyond that, it is my view that any reasonable person would have inquired. I do not accept, in the absence of any evidence, that Mrs. Zimmerman bound Mr. Zimmerman to any obligation to perform services for Celerity. While Celerity has had the benefit of work performed by Mr. Zimmerman, Mr. Zimmerman may have a restitutionary claim against Celerity in another forum. I am satisfied that the Delegate erred in finding an employment relationship between Mr. Zimmerman and Celerity.

In my view there is no sufficient factual foundation for the Delegate to have found that the employer expected Ralph Zimmerman to work. The employer certainly expected the person who accepted the job to be able to work and have knowledge of building trades. The employer preferred a couple to occupy the resident manager's suite. There is, however, no evidence that the employer intended to hire and pay two people for the job.

Issue #2: Is Ralph Zimmerman entitled to repayment of the cost of a phone bill and move?

In my view, my ruling that Mr. Zimmerman was not an employee, disposes of his claim that the Delegate erred in the amount of the Determination. For the purposes, of any further review of this decision, I wish to set out further reasons why Mr. Zimmerman is not entitled to payment for the above noted items. I note that Mr. Zimmerman, as the appellant in his appeal, bears the onus of showing an error such that I should vary or cancel the Determination.

There is no evidence in this case, that it was ever part of an employment contract that the employer would pay the costs of Mrs. Zimmerman or Mr. Zimmerman to move from Fort St. John to Houston. I think the reasons that the parties moved to Houston, was so that Mrs. Zimmerman could be closer to her mother. There is no evidence before me from which I can conclude that the employer "induced, influenced or persuaded" Mr. or Mrs. Zimmerman by misrepresenting any terms or conditions of employment. If I had been satisfied that there was a misrepresentation or an inducement then I would have found that the moving cost was an item of damage caused by a misrepresentation, and an item of wages. I am not satisfied that the Delegate erred with regard to the moving costs.

With regard to the telephone bill, there is no evidence before me that the employer promised to pay the telephone bill, or that the telephone bill was a business expense of the company, which the company required Mr. Zimmerman to pay. Short of an agreement that the telephone bill was an item of wages, or a finding under s. 21 (2) of the Act that the phone bill was a business cost, of the employer, there is simply no jurisdiction for me to order the company pay the telephone bill of Mr. And Mrs. Zimmerman. I am not satisfied that the Delegate erred with regard to the telephone bill.

ORDER

Pursuant to section 115(1)(a) of the Act, I cancel the Determination dated November 24, 2000.

Paul E. Love
Adjudicator
Employment Standards Tribunal